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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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# No. 499

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MEMPHIS NATURAL GAS COMPANY,
*Appellant,*

*vs.*

ROY H. BEELER, ATTORNEY GENERAL OF THE STATE OF TENNESSEE, ET AL.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

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## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS THE APPEAL.

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# SUPREME COURT OF THE UNITED STATES

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*Appellant,*

*vs.*

ROY H. BEELER, ATTORNEY GENERAL OF THE STATE OF TENNESSEE, ET AL.

## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS THE APPEAL.

MAY IT PLEASE THE COURT:

I.

This appeal attempts to attack the validity of the Tennessee Excise Tax Statutes, Sections 1316-1318 of the Official Code of Tennessee (1932), as construed by the officials of Tennessee and applied to the appellant. These statutes are correctly set out in the jurisdictional statement of appellant and are not therefore re-copied here. The asserted invalidity of these code sections is based on what appellant conceives to be a conflict with the commerce clause of the Constitution of the United States. This contention was first made in the Supreme Court of Tennessee and was not seriously pressed there. The original theory of the appel-

plant was that it was immune to excise taxation because of its rights and privileges under the commerce clause and this was the theory advanced in the Chancery Court of Davidson County, Tennessee. We therefore believe that the Supreme Court of the United States has jurisdiction of this case, if at all, only on certiorari under Section 237-A of the Judicial Code as amended and that the appeal was improperly granted.

## II.

### The Nature of the Tennessee Tax Complained of by Appellant.

The tax which appellant complains of is called an excise tax, it is a tax on corporations and joint stock associations for the privilege of doing business in Tennessee in corporate form. This is the construction placed on the law by the Supreme Court of Tennessee, '* * * The tax laid upon the privilege of conducting business as a corporation within the state is graduated upon the result of the exercise of the privilege.' *Bank of Commerce* v. *Senter*, 149 Tenn., 584.

The tax is measured by net earnings of the taxpayers from business done wholly within the State and on its face excludes net earnings arising from interstate commerce as a measure of the tax. The statutes in no way conflict with the commerce clause as construed by the Supreme Court of the United States. The tax contains no unusual provisions and is of a type many times sustained by the Supreme Court of the United States.

*Atlantic Lumber Company* v. *Commissioner of Corporations and Taxation*, 298 U. S. 553, 80 L. Ed. 1528, 56 S. Ct. 887.

*Southern Natural Gas Company* v. *Alabama*, 301 U. S. 148, 81 L. Ed. 970, and cases there discussed.

See also *McGoldrick* v. *Berwind-White Coal Mining Company*, 309 U. S. 33, 84 L. Ed. 565.

## III.

### The Nature of Appellant's Business and Activities in Tennessee.

Appellant is a Delaware corporation domesticated in Tennessee, it was organized in 1928 for the purpose of transporting by pipeline natural gas from Louisiana, which it purchased there and selling it in Memphis and Shelby County, Tennessee. At first appellant had only one customer, the Memphis Power and Light Company which bought for consumption in its electric generating plant in Memphis and also distributed gas to burner tip users in Memphis and Shelby County Tennessee as a joint adventure with appellant. Subsequently appellant added as customers the West Tennessee Power and Light Company (in Tennessee), the Arkansas Power and Light Company, the Mississippi Power and Light Company, and the Louisiana Power and Light Company. These customers were distributors of natural gas to burner tip users and they bought gas from appellant on an open buyer and seller basis, they with the exception of the first named also took the gas at line pressure. The Memphis operation was totally different from this, under the contract with the Memphis Power and Light Company the appellant shared the profits and losses of this company from the distribution of the natural gas. Also appellant maintained operatives in Memphis to increase or diminish the supply of gas to suit the hourly needs of the local market, one of such operatives was a dispatcher who by means of telephone controlled the input of gas in Louisiana to fit the requirements of the Tennessee market from hour to hour. The gas delivered in Memphis was reduced in pressure at the time it passed into the lines of the Memphis Power and Light Company and the West Tennessee Power and Light Com-

pany, whereas deliveries outside of Tennessee were made at an unreduced pressure or at line pressure.

Appellant maintained its principal office in Memphis, its president lived there, and all of its business was conducted from that office. All orders for gas were received in the Memphis office and all of the billing for gas delivered in Tennessee and elsewhere was from the Memphis office, all collections and disbursements, all supervision and control of the company were handled and centered in the Memphis office. While Delaware was the state of its incorporation, Tennessee was its commercial domicile.

*Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193, 80 L. Ed. 1143.

IV.

**Only Earnings From Business Done Wholly Within Tennessee Were Used as a Measure of Tax.**

Appellant was originally assessed for excise taxes in Tennessee in this proceeding on April 24, 1938 for the years 1932, 1933 and 1934 in the amount of $57,156.83 which tax was measured by the entire net income of appellant from all sources. Thereafter and on June 9, 1938 a corrected assessment was made in the amount of $54,179.31 for the years 1932, 1933, 1934 and 1935 based on the net earnings of appellant from business done in Tennessee as shown by the books and records of appellant. So, no question is present concerning the use of any earnings as a measure of tax which did not arise from business done in the market afforded and protected by Tennessee.

During the period in question in this suit the appellant's business done in Tennessee with and through the Memphis Power and Light Company constituted the following percentages of the total business done by the appellant everywhere: 1932, 83.24%; 1933, 83.08%; 1934, 81.47%; 1935, 80.06%. For the same period the business done by appel-

lant with and through the West Tennessee Power and Light Company amounted to approximately one or two per cent of the total business done. The percentage of business done in Tennessee by the direct delivery of gas to consumers on demand by appellant in furnishing gas to the electric generating plant of the Memphis Power and Light Company for fuel was: 1932, 33.49%; 1933, 33.22%; 1934, 27.78%; 1935, 24.34%, the rest of the business done in Tennessee by appellant was done under its profit sharing arrangement with this company.

The profit sharing arrangement, styled by the Supreme Court of Tennessee as a joint adventure, was contractual. It was provided in the contract for the delivery of gas to burner-tip users in Memphis and Shelby County, Tennessee that certain depreciation losses should be taken by appellant and the Memphis Power and Light Company and certain other specified arbitrary deductions were to be made by both parties from the net earnings derived from the sale of gas to these users. After these deductions were made then the surplus remaining was divided between the two companies, unless all of the deficits of both companies were made up and an excess remained over and above one and one-half per cent of the investment of the Memphis Power and Light Company, if this situation existed then the appellant received the entire overplus.

This contractual relationship furnished one of the bases for the imposition of the tax liability on appellant by the Supreme Court of Tennessee, as shown by that Court's opinion:

> "It is not necessary to determine when title to the gas passed to Memphis Power and Light Company or whether title ever actually passed. If title passed, then, still the business in distributing to consumers was for and on behalf of both these development and operating corporations, and Memphis Natural Gas Company was

engaged through its co-operative in intrastate business in Tennessee."

At the time of appellant's organization twenty-five per cent of its capital stock was given to the Electric Bond and Share Company, and appellant was a registered subsidiary of this parent corporation in the reports filed with the Securities and Exchange Commission. The supplier of gas to appellant, United Gas Company, and all of appellant's customers both inside and outside of Tennessee were subsidiaries of Electric Bond and Share Company. At all times since its organization the appellant had one or more common directors with some one of these Electric Bond and Share Company subsidiaries.

V.

**Earnings Used as a Measure of Tax Not Separated.**

The judgment appealed from in this case is an agreed judgment as to amount. Counsel for both parties agreed that if the appellees recovered that the amount shown in the final decree of the Supreme Court of Tennessee was the correct amount due. The appellant complained in its petition to re-hear in the Supreme Court of Tennessee that certain of its earnings should not have been included in the measure of tax, this Court in disposing of this contention said:

"This suit is to enjoin collection of taxes. If it be true there are some profits that might be ascribed to purely interstate commerce, such earnings should have been set out separately with proper definiteness of averment in the bill and then supported by proof and pointed out in the brief in order to obtain the injunction. This has not been done."

See also *Indiana* v. *Ingram-Richardson Mfg. Co.*, U. S. 61 S. Ct. 868.

## VI.

### No Substantial Federal Question is Involved in This Appeal.

There is no substantial federal question involved in this appeal. It is true that appellant claimed immunity from taxation under the commerce clause of the Constitution of the United States however on the facts this claim is without merit. The appellant committed a taxable act when it did business in Tennessee in corporate form. The commerce clause does not prohibit taxation of corporations by the states for the exercise of this privilege. The only other claim of conflict with the federal constitution which could be claimed is that the tax is measured by net earnings arising from business conducted in interstate commerce or business done in some state other than Tennessee. No such contention is tenable here, the only earnings used as a measure of tax were those derived from business done in Tennessee.

The fact that the goods sold by appellant in Tennessee were imported from another state does not give tax immunity to the appellant under the commerce clause. Nothing in the federal constitution prohibits a state from taxing all corporations doing business in such state alike, whether their business incidentally affects interstate commerce or is wholly remote therefrom. No requirement can be found in the constitution which requires Tennessee to discriminate in favor of interstate commerce, if we admit for the sake of argument that the business of appellant had some interstate features.

This case is practically identical on its facts with the case of *Southern Natural Gas Company* v. *Alabama, supra*, where it was held by the Supreme Court of the United States that the Alabama franchise tax did not conflict with the commerce clause.

In *McGoldrick* v. *Berwind-White Coal Mining Company*, the taxpayer claimed immunity to the New York City sales tax, its contention was based on the allegation that it was engaged solely in interstate commerce because its sales contracts contemplated shipment across state lines. The Court disposed of this contention as follows:

> "Respondent, pointing to the course of its business and to its contracts which contemplate the shipment of coal interstate upon orders of New York customers, insists that a distinction is to be taken between a tax laid on sales made, without previous contract, after the merchandise has crossed the state boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise interstate to the taxing state. Only the sales in the state of destination in the latter class of cases, it is said, are protected from taxation by the commerce clause, a qualification which respondent concedes is a salutary limitation upon the reach of the clause since its use is thus precluded as a means of avoiding state taxation of merchandise transported to the state in advance of the purchase order or contract of sale.
>
> "But we think this distinction is without the support of reason or authority * * *."
>
> (Pages 53 and 54 of the opinion.)

In the present case appellant delivered gas in Tennessee on orders received hourly in its Memphis, Tennessee office. That earnings from such business may be used as a measure of corporate excise tax by Tennessee without conflict with any provision of the federal constitution is settled by the Court of last resort. It is further settled that such business is not interstate commerce but a local enterprise.

The Tennessee tax here complained of is non discriminatory. All corporations doing business in Tennessee are taxed alike, and the tax is in no sense a tax barrier. It does not place interstate commerce at a disadvantage, nor impose any undue burden thereon, nor does it in any way regu-

late such commerce. As applied to appellant on the facts of the case the tax complained of is a valid exaction and the case made and presents no federal question.

**Conclusion.**

Accordingly appellees move the Court to dismiss the appeal:

First, Because it was improvidently granted, the proper mode of review, if appellant is entitled to a review, is by certiorari.

Second, Because of the lack of any substantial federal question.

If it should be determined that the appeal was improvidently taken and a review can only be had on certiorari and the papers whereon the appeal was allowed are treated as a petition for certiorari, then, appellees move the Court to dismiss the writ because the questions presented have so recently been passed upon by the Supreme Court of the United States that there is no reasonable ground for the granting of a petition for certiorari.

*Southern Natural Gas Company* v. *Alabama*, *supra*;
*Interstate Natural Gas Company* v. *Stone, Commissioner*, 103 F. (2d) 544, 307 U. S. 624;
*McGoldrick* v. *Berwind-White Coal Mining Company*, *supra*;
*Nelson* v. *Sears-Roebuck*, — U. S. —, 85 L. Ed. 523.

Respectfully submitted,

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